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November 28, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Hearing Officer's Decision

Name of Case: Personnel Security Hearing

Date of Filing: June 30, 2005

Case Number: TSO-0256

This Decision considers the eligibility of XXXXXXXX XXXXXXXX (hereinafter referred to as "the individual") to hold an access authorization under the regulations set forth at 10 C.F.R. Part 710, entitled "Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material." As explained below, it is my decision that the individual's access authorization should not be restored.

I. BACKGROUND

The individual is an employee of a Department of Energy (DOE) contractor, and was granted a DOE access authorization in 2000. In August 2003, the individual submitted an Incident Report concerning an arrest for driving while intoxicated (DWI). In October 2003, the DOE conducted a Personnel Security Interview with the individual (the 2003 PSI). In addition, the individual was evaluated in November 2004 by a DOE-consultant psychiatrist (the DOE-consultant psychiatrist), who issued a report containing his conclusions and observations).

In May 2005, the Manager for Personnel Security of the DOE area office where the individual is employed (the Manager) issued a Notification Letter to the individual. In this letter, the Manager states that the individual's behavior has raised security concerns under Sections 710.8(j) of the regulations governing eligibility for access to classified material. Specifically, with respect to Criterion (j), the Operations Office finds that the DOE-consultant psychiatrist diagnosed the individual as meeting the criteria for Substance Abuse, Alcohol, found in the *Diagnostic and Statistical Manual of the American Psychiatric Association, IVth Edition (DSM-*

IV TR). The Notification Letter also refers to his August 2003 arrest for DWI with a blood alcohol concentration of .11, and to the following four alcohol related incidents involving the individual that he discussed with the DOE at his 2003 PSI:

1. In about August 2002, he drove after drinking alcohol at a wedding and believed that he may have been alcohol impaired;
2. In September 1997, following a fistfight, he and the person he fought with were arrested for battery, and the individual admitted to consuming a couple of beers before the physical altercation;
3. In 1985, following an automobile accident, he was arrested for DWI with a blood alcohol concentration of 0.147; and
4. In 1984, the police were called to deal with a disturbance between the individual and his girlfriend. The individual acknowledged that the altercation was alcohol-related.

The individual requested a hearing (hereinafter "the Hearing") to respond to the concerns raised in the Notification Letter. As his initial response to those concerns, the individual asserted that

I may have been in denial as to the amount of alcohol I consumed in the past. I have since taken a more responsible approach to my behavior by not consuming alcohol. I will attend counseling. I've also decided to work with my family doctor to monitor my health.

Individual's June 2005 Request for Hearing.

The requested hearing in this matter was convened in September 2005 (hereinafter the "Hearing"). At the Hearing, the individual did not contest the DOE-consultant psychiatrist's diagnosis of alcohol abuse. Accordingly, I find that the individual suffers from alcohol abuse subject to Criterion (j). The testimony at the Hearing focused chiefly on the concerns raised by the individual's past pattern of alcohol consumption, and on the individual's efforts to mitigate those concerns through abstinence from alcohol and recovery activities.

II. REGULATORY STANDARD

In order to frame my analysis, I believe that it will be useful to discuss briefly the respective requirements imposed by 10 C.F.R. Part 710 upon the individual and the Hearing Officer. As discussed below, Part 710 clearly places upon the individual the responsibility to bring forth persuasive evidence concerning his eligibility for access authorization, and requires the Hearing Officer to base all findings relevant to this eligibility upon a convincing level of evidence. 10 C.F.R. §§ 710.21(b)(6) and 710.27(b),(c) and (d).

A. *The Individual's Burden of Proof*

It is important to bear in mind that a DOE administrative review proceeding under this Part is not a criminal matter, where the government would have the burden of proving the defendant guilty beyond a reasonable doubt. The standard in this proceeding places the burden of proof on the individual. It is designed to protect national security interests. The hearing is "for the purpose of affording the individual an opportunity of supporting his eligibility for access authorization." 10 C.F.R. § 710.21(b)(6). The individual must come forward at the hearing with evidence to convince the DOE that restoring his access authorization "would not endanger the common defense and security and would be clearly consistent with the national interest." 10 C.F.R. § 710.27(d). *Personnel Security Review (Case No. VSA-0087)*, 26 DOE ¶ 83,001 (1996); *Personnel Security Hearing (Case No. VSO-0061)*, 25 DOE ¶ 82,791 (1996), *aff'd*, *Personnel Security Review (VSA-0061)*, 25 DOE ¶ 83,015 (1996). The individual therefore is afforded a full opportunity to present evidence supporting his eligibility for an access authorization. The regulations at Part 710 are drafted so as to permit the introduction of a very broad range of evidence at personnel security hearings. Even appropriate hearsay evidence may be admitted. 10 C.F.R. § 710.26(h). Thus, by regulation and through our own case law, an individual is afforded the utmost latitude in the presentation of evidence which could mitigate security concerns.

Nevertheless, the evidentiary burden for the individual is not an easy one to sustain. The regulatory standard implies that there is a presumption against granting or restoring a security clearance. See *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988) ("clearly consistent with the national interest" standard for the granting of security clearances indicates "that security determinations should err, if they must, on the side of denials"); *Dorfmont v. Brown*,

913 F.2d 1399, 1403 (9th Cir. 1990), cert. denied, 499 U.S. 905 (1991) (strong presumption against the issuance of a security clearance). Consequently, it is necessary and appropriate to place the burden of persuasion on the individual in cases involving national security issues. In addition to his own testimony, we generally expect the individual in these cases to bring forward witness testimony and/or other evidence which, taken together, is sufficient to persuade the Hearing Officer that restoring access authorization is clearly consistent with the national interest. *Personnel Security Hearing* (Case No. VSO-0002), 24 DOE ¶ 82,752 (1995); *Personnel Security Hearing* (Case No. VSO-0038), 25 DOE ¶ 82,769 (1995) (individual failed to meet his burden of coming forward with evidence to show that he was rehabilitated and reformed from alcohol dependence).

B. Basis for the Hearing Officer's Decision

In personnel security cases under Part 710, it is my role as the Hearing Officer to issue a decision as to whether granting an access authorization would not endanger the common defense and security and would be clearly consistent with the national interest. 10 C.F.R. § 710.27(a). Part 710 generally provides that "[t]he decision as to access authorization is a comprehensive, common-sense judgment, made after consideration of all relevant information, favorable and unfavorable, as to whether the granting or continuation of access authorization will not endanger the common defense and security and is clearly consistent with the national interest." 10 C.F.R. § 710.7(a). I must examine the evidence in light of these requirements, and assess the credibility and demeanor of the witnesses who gave testimony at the hearing.

III. HEARING TESTIMONY

At the Hearing, testimony was received from seven persons. The DOE presented the testimony of the DOE-consultant psychiatrist. 1/ The individual, who was not represented by counsel, testified and presented the testimony of a co-worker, a fellow participant and group leader in Alcoholics Anonymous (AA), a longtime friend who is now his girlfriend, his mother, and his step father.

1/ As indicated by the testimony of the DOE-consultant psychiatrist (TR at 10) and by his curriculum vitae (DOE Exhibit 4), he clearly qualifies as an expert witness in the area of addiction psychiatry.

A. *The DOE-Consultant Psychiatrist*

The DOE-consultant psychiatrist testified that in late November 2004 he evaluated the individual for alcohol problems. The DOE-consultant psychiatrist concluded that the individual met the *DSM-IV TR* criteria for Alcohol Abuse.

At the Hearing, the DOE-consultant psychiatrist testified that he was concerned about the individual's history of alcohol-related legal problems that were summarized in the Notification Letter. TR at 14. He stated that the individual's two DWI arrests

Are commonly kind of tips of the iceberg in that for every DWI it's estimated that anywhere from one to a hundred or more times when the person probably has been driving while impaired by alcohol.

TR at 14-15. He also testified that two actions taken by the individual after his second DWI in August 2003 indicated that his problem with alcohol was persistent and severe. First, the individual continued to drink while on probation, even though the standard probation of one year after a second DWI requires the person to maintain sobriety. Second, the individual had triggered the breath activated interlock mechanism that had been placed on his car.

He blew a .028 percent [alcohol] one day while trying to start his car. That was a concern. He excused it by saying it might have been due to mouthwash, but I didn't find that credible.

TR at 16. Finally, the DOE-consultant psychiatrist testified that at the time of his November 2004 evaluation, the individual had two abnormally elevated liver enzyme levels which are most commonly associated with excessive drinking. He further stated that the individual had tested negative for hepatitis infection, a condition which can produce elevated liver enzyme levels, and that he had not been taking any medications that could result in these elevated liver enzyme levels. TR at 16-17.

With regard to rehabilitation and reformation, the DOE-consultant psychiatrist testified that during his November 2004 evaluation, the individual had told him that his last drink had been on Thanksgiving Day, about five days earlier. The individual told him that his intention was to cut back in his drinking. The DOE-consultant psychiatrist concluded that the individual

didn't think he had a problem with alcohol abuse that needed to be rehabilitated or reformed, and the other signs of rehabilitation, being in a rehabilitation program or beginning sobriety, were not there.

TR at 19.

The DOE-consultant psychiatrist further testified that in his December 2004 Report, he wrote that for the individual to demonstrate adequate evidence of rehabilitation, he enter into outpatient treatment of "moderate intensity."

By moderate intensity I mean a treatment regimen such as Alcoholics Anonymous a few times per week, perhaps with individual counseling as well, and should include maintenance of sobriety (abstinence form alcohol). Duration of such treatment should be for a year or two to provide adequate evidence of rehabilitation and reformation.

DOE-consultant psychiatrist's December 2004 Report at 10. At the Hearing, the DOE-consultant psychiatrist testified that a year of sobriety combined with outpatient treatment would be an adequate period of time to demonstrate rehabilitation and reformation. TR at 20-21.

B. The Individual

The individual began his testimony by stating that he did disagree with the DOE-consultant psychiatrist's 2004 Report and with his initial testimony at the Hearing.

I respect the [DOE-consultant psychiatrist's] profession, and I think he was adequate in his diagnosis. And I decided to take the route of abstaining from alcohol and followed his advice.

TR at 21. He stated that he did not receive the DOE-consultant psychiatrist's 2004 Report until September 2005, but that he had made the decision to abstain from alcohol before he read the Report. TR at 22. He testified that he has abstained from alcohol at least since February 2, 2005. TR at 27. He stated that had "slowed down a lot" in his drinking following his November 2004 evaluation by the DOE-consultant psychiatrist, and that in early 2005 "I decided to take it very much more seriously than that and quit." TR at 27. He explained that his decision to quit resulted from admitting to himself that he was "in denial" about his problem

with alcohol, and that "I needed to take steps to fix it." TR at 27-28. He stated that he began attending AA in June 2005 after a co-worker who has been in AA for about twenty years took him to a meeting. TR at 29-30. He stated that he generally attends AA twice a week, and submitted an attendance sheet that documents that assertion. TR at 34 and Individual's Exhibit One. He stated that he is not working the steps of the AA program, and described his AA participation as

abstaining and being honest, talking about . . . if there are any issues that come up with the desire to drink, the spirituality, coming to terms with God, and just not drinking, . . . reevaluate your life and also try to help other people if they have a problem.

TR at 31-32. He stated that he does not have an AA sponsor, and that he considers his longtime friend and current girlfriend to be his confidant and advisor on alcohol issues. TR at 32.

With regard to his current activities, he stated that

I've been doing a lot more hiking. I still watch a lot of TV. I'm spending time with people who don't drink. My parents, I live next door to them. I, as a hobby, raise horses, and I do a lot of traveling around the state doing that. That keeps me busy in the off hours.

TR at 31. He testified that he no longer goes to bars, and that he does not have a desire to drink alcohol. He stated that he and his girlfriend go to dinner, watch movies, and take casual trips with other friends who do not drink. TR at 35-36. He stated that he does not keep alcohol in his house. TR at 37.

The individual stated that the week before the Hearing, he got a liver enzyme test done as a means of documenting his sobriety, but that he had not received the results. The DOE-consultant psychiatrist then called the laboratory and was provided with the test results. He reported that

The liver enzyme levels that [the laboratory] obtained, the AST and ALT, are both normal, within a normal range. And when I evaluated [the individual], the ALT liver enzyme level was abnormally elevated. So the enzyme levels are consistent with his contention that he's been sober for eight months.

TR at 41.

The individual stated that his current intention with regard to alcohol is "to stay away from it."

I feel I've made a life decision for now not to drink, definitely. I probably won't ever go back to drinking. You know, in talking to other people, if you try to drink again a lot of people just relapse, and I don't want to go through that.

TR at 37.

C. The Individual's Coworker

The individual's coworker testified that she has known the individual for three years and has worked closely with him all of that time. TR at 45-46. She testified that she has never seen the individual intoxicated or in a condition where he could not perform his job. TR at 47. She stated that she has never smelled alcohol on his breath and that he has an excellent attendance record at work. TR at 50-51. She stated that he has a reputation as a hard worker and a good worker, and that he has received an achievement award for his job performance. TR at 47.

She stated that she does not socialize with the individual outside of the workplace. She stated that she observed the individual drink moderately at dinner when they attended a business conference two years ago. TR at 48. She stated that she has not observed the individual consume alcohol in the last twelve months. TR at 50.

D. The Individual's AA Group Leader

The individual's AA group leader testified that he knows the individual because they have been attending the same AA meetings for several months. TR at 52.

[The individual is] an outspoken guy there at the meetings, as well as I am. And after the meetings a bunch of us hang out and talk, see how everything is going, and we got to know each other like that.

Id. The AA group leader stated that the individual is an active participant in AA meetings, and that he believes from what individual has shared at the meetings, that he is sincere in wanting to maintain his sobriety. TR at 53. He stated that the

individual does not have an AA sponsor, and that "probably 85 to 90 percent of the people in there have a sponsor." TR at 55. He stated that the AA group that he and the individual attend is an informal group that doesn't place an emphasis on working the twelve steps.

What we'll do is ask the chairperson to pick a topic, or he'll open it up to the group, if someone has a burning desire, and then they'll pick a topic. If we have room at the end of the meeting, we'll discuss a step or a principle or something like that.

TR at 58-59.

E. The Individual's Mother

The individual's mother testified that the individual used to drink occasionally, especially on weekends. She stated that he now lives next door to her, that he visits her for dinner on week nights, and that he stops by on weekends.

Every single [week] day he comes over to have dinner with us, and so I see him every day. On weekends he goes . . . somewhere to do with horses. When he comes back he comes in to talk to me, let me know he's back. So for a fact I know that he has not been drinking.

TR at 60. She confirmed that he attends AA meetings on Tuesdays and Fridays. She testified that the individual had stopped drinking alcohol by February 2005 because she recalled that he brought non-alcoholic beer to a family birthday dinner party that she had in that month. She stated that he stopped drinking non-alcoholic beer after he started attending AA meetings in June 2005, and that now he will drink canned soda pop or water at dinner. TR at 64-65.

The individual's mother testified that the individual's AA meetings "are really helping him" and that

He has indicated to me that he doesn't want to go back to drinking, or he doesn't intend to go back to drinking.

TR at 62.

F. The Individual's Step-Father

The individual's step-father testified that four or five nights a week the individual has dinner with himself and the individual's mother. He stated that the individual stopped drinking alcohol "possibly a year, seven, eight months ago," and that since then he has only observed the individual occasionally consume a non-alcoholic beer. TR at 74. He stated that the individual is "very committed" to not drinking in the future. TR at 75.

G. The Individual's Girlfriend

The individual's girlfriend testified that she has known the individual since high school, and that they have been romantically involved since July 2005. She stated that she does not drink alcohol, and that she knew that the individual consumed alcohol and occasionally abused it. TR at 68-69. She stated that she last saw him consume alcohol at a Christmas party in December 2004. TR at 71. She stated that she did not see the individual from December 2004 until they started dating in July 2005, and that sometime during this period he stopped drinking. TR at 70-71. She stated that the individual has told her that he enjoys going to AA meetings and that he's getting something out of it. She believes that the individual is motivated to maintain his sobriety. TR at 70.

H. The DOE-Consultant Psychiatrist's Additional Testimony

Following the testimony of the other witnesses, the DOE-consultant psychiatrist testified that the individual had corroborated his commitment to sobriety and the fact that he's been able to maintain it. TR at 76. He concluded that the individual had been sober for eight months and in treatment at AA for three months. He stated that the individual was on a trajectory of improving sobriety beginning with slowing down his drinking after his November 2004 evaluation, beginning sobriety on February 2, 2005, and then starting AA attendance and giving up non-alcoholic beer in June 2005.

The testimony of his AA group leader was impressive. Future steps you would see would be to deepen it by getting into working the 12 steps. That's not required, but certainly recommended in AA. Partnering up with a sponsor, and usually people won't do that in the beginning, they need to first check out the different people that are in the group to see who you would feel comfortable with as having as your sponsor. But as far

as future steps that I would be hoping to see would be that.

TR at 78. The DOE-consultant psychiatrist concluded that

Although he has not had a year of rehabilitation or reformation that I recommended, he looks like he's made a good start, and I would date the beginning of his period of rehabilitation and reformation from February 2, 2005. And if he can continue it, I guess as of February 2, 2006, he would have completed what I basically just recommended in my report.

TR at 79. The DOE-consultant psychiatrist testified that the individual needed to complete a year of sobriety and treatment

Before I would vouch for him as saying this person is rehabilitated and I can vouch that there is basically a low likelihood that problems are going to occur again. A year will give, first of all, simply more time to demonstrate that he's able to do it. It's very difficult. Also a year puts you through all the challenges, Christmas, birthdays, the annual things that come around that can be a challenge.

TR at 78-79.

IV. ANALYSIS

The individual believes that his eight months of sobriety, his participation in AA meetings, and his dedication to future abstinence from alcohol fully mitigate the Criterion (j) security concerns arising from his diagnosis of alcohol abuse and his arrests for DWI in 2003 and 1985, and from his other alcohol related legal problems. For the reasons stated below, I conclude that the individual's arguments and supporting evidence concerning his rehabilitation from alcohol abuse do not resolve the DOE's security concerns as of the date of the Hearing.

The testimony at the Hearing indicated that the individual has abstinent from alcohol since February 2, 2005 and has attended AA meetings approximately twice a week since June 10, 2005. In the administrative review process, it is the Hearing Officer who has the responsibility for forming an opinion as to whether an individual with alcohol problems has exhibited rehabilitation or reformation. See 10 C.F.R. § 710.27. The DOE does not have a set policy on what constitutes rehabilitation and reformation from

alcohol diagnoses, but instead makes a case-by-case determination based on the available evidence. Hearing Officers properly give a great deal of deference to the expert opinions of psychiatrists and other mental health professionals regarding rehabilitation and reformation. See, e.g., *Personnel Security Hearing (Case No. VSO-0027)*, 25 DOE ¶ 82,764 (1995) (finding of rehabilitation); *Personnel Security Hearing (Case No. VSO-0015)*, 25 DOE ¶ 82,760 (1995) (finding of no rehabilitation). At the Hearing, the DOE-consultant psychiatrist concluded that the individual was making good progress in his recovery from alcohol abuse but that he needed to continue his sobriety along with his AA participation until February 2, 2006, before he could demonstrate rehabilitation and reformation from his diagnosis of alcohol abuse and his alcohol-related legal problems.

I agree with the DOE-consultant psychiatrist's conclusions. My positive assessment of the individual's demeanor and of the evidence presented at the Hearing convince me that the individual has maintained his sobriety since February 2, 2005, that he has committed himself to sobriety, that he is actively participating in AA meetings, and that he has shared his commitment to sobriety with his parents and his girlfriend. In addition, the individual has demonstrated an ability to conduct his social and recreational activities without alcohol. These positive developments are all significant factors which indicate progress towards rehabilitation and reformation from alcohol abuse. However, I agree with the DOE-consultant psychiatrist that the individual must maintain his sobriety, along with his current AA participation, until February 2, 2005 before he can be considered reformed and rehabilitated from alcohol abuse. The DOE-consultant psychiatrist believes that a full year of abstinence from alcohol, demonstrating that the individual can handle the challenges to abstinence posed by holidays, vacations and other circumstances, is necessary for the individual to demonstrate that he is at low risk for relapsing into alcohol abuse. I find these concerns raised by the DOE-consultant psychiatrist to be reasonable and persuasive, and I find that rehabilitation or reformation has not yet occurred. Accordingly, I believe that it would not be appropriate to restore the individual's access authorization at this time.

V. CONCLUSION

For the reasons set forth above, I find that the individual suffers from alcohol abuse subject to Criterion (j). Further, I find that this derogatory information under Criterion (j) has not been mitigated by sufficient evidence of rehabilitation and reformation at this time. Accordingly, after considering all of the relevant

information, favorable or unfavorable, in a comprehensive and common-sense manner, I conclude that the individual has not yet demonstrated that granting him access authorization would not endanger the common defense and would be clearly consistent with the national interest. It therefore is my conclusion that the individual's access authorization should not be restored. The individual or the DOE may seek review of this Decision by an Appeal Panel under the regulation set forth at 10 C.F.R. § 710.28.

Kent S. Woods
Hearing Officer
Office of Hearings and Appeals

Date: November 28, 2005